



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WALTER WARE,
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Plaintiff, :
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- against - :
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:
CYNTHIA BRANN, *et al.*, :
:
:
Defendants. :
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21-CV-2028 (PGG) (RWL)

**ORDER DENYING
PRO BONO COUNSEL**

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Pro se Plaintiff has filed an Application for the Court to Request Counsel. For the following reasons, Plaintiff's application is denied.

LEGAL STANDARD

The *in forma pauperis* statute provides that the courts "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). Unlike in criminal cases, in civil cases, there is no requirement that courts supply indigent litigants with counsel. *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986). Instead, the courts have "broad discretion" when deciding whether to seek *pro bono* representation for a civil litigant. *Id.* Even if a court does believe that a litigant should have a free lawyer, under the *in forma pauperis* statute, a court has no authority to "appoint" counsel, but instead, may only "request" that an attorney volunteer to represent a litigant. *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 301–310 (1989). Moreover, courts do not have funds to pay counsel in civil matters. Courts must therefore request the services of *pro bono* counsel sparingly, and with reference to public benefit, in order to preserve the

“precious commodity” of volunteer-lawyer time for those litigants whose causes are truly deserving. *Cooper v. A. Sargenti Co., Inc.*, 877 F.2d 170, 172-73 (2d Cir. 1989).

In *Hodge*, the Second Circuit Court of Appeals set forth the factors a court should consider in deciding whether to grant a litigant’s request for *pro bono* counsel. 802 F.2d at 61-62. Of course, the litigant must first demonstrate that he or she is indigent, for example, by successfully applying for leave to proceed *in forma pauperis*. The court must then consider whether the litigant’s claim “seems likely to be of substance” – “a requirement that must be taken seriously.” *Id.* at 60–61. If these threshold requirements are met, the court must next consider such factors as:

the indigent’s ability to investigate the crucial facts, whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder, the indigent’s ability to present the case, the complexity of the legal issues[,] and any special reason in that case why appointment of counsel would be more likely to lead to a just determination.

Id.; see also *Cooper*, 877 F.2d at 172 (listing factors courts should consider, including litigant’s efforts to obtain counsel). In considering these factors, district courts should neither apply bright-line rules nor automatically deny the request for counsel until the application has survived a dispositive motion. See *Hendricks v. Coughlin*, 114 F.3d 390, 392-93 (2d Cir. 1997). Rather, each application must be decided on its own facts. See *Hodge*, 802 F.2d at 61.

DISCUSSION

Plaintiff filed a Request to Proceed *in Forma Pauperis* (IFP), which the Court granted. (See Order dated May 19, 2021, Dkt. 7.) When Plaintiff filed his Application for the Court to Request Counsel, he affirmed that his financial status had not changed. (See Dkt. 98 at ECF 1.) Plaintiff therefore qualifies as indigent. The Court does not find,

however, that Plaintiff's claim "seems likely to be of substance." *Hodge*, 802 F.2d 61-62. Plaintiff asserts a Section 1983 claim based on allegedly unconstitutional conditions of confinement, specifically that spacing among prisoners was less than six feet during the Covid-19 pandemic. Plaintiff alleges emotional distress but does not allege that he contracted Covid-19. Moreover, his allegations concern conditions that no longer apply. Because the threshold requirement for appointment of pro bono counsel has not been satisfied, the Court does not address the additional *Hodge* factors.

CONCLUSION

For the foregoing reasons, Plaintiff's Application for the Court to Request Counsel is denied.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith and therefore IFP status is denied for the purpose of an appeal. See *Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.



ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: July 24, 2023
New York, New York

Copies transmitted this date to all counsel of record. The Court respectfully requests the Clerk of Court to mail a copy of this Order to the pro se Plaintiff:

Walter Ware
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